No. 08-1370

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SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

MARQUERITE A. JOHNSON,

Petitioner,

v.

ORLANDO J. GEORGE, JR., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ORLANDO J. GEORGE, JR. AND DELAWARE TECHNICAL AND COMMUNITY COLLEGE

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QUESTIONS PRESENTED

I. Whether Petitioner's failure to present the Seventh Amendment claim to the courts below precludes consideration of the claim by this Court?

II. Whether this Court should review a substantive due process claim which was asserted for the first time in Petitioner's surreply brief in summary judgment briefing.

III. Whether summary judgment on a substantive due process claim is appropriate where an administrative decision to dismiss an employee is supported by substantial evidence, and the employee presents nothing which suggests the employer acted arbitrarily or irrationally in a way that would shock the conscience of the Court?

IV. Whether an employee who received more process than she was due under the Due Process Clause, and her employment agreement, has a viable procedural due process claim.

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STATEMENT OF THE CASE

Petitioner Marguerite A. Johnson ("Petitioner" and referred to as "Johnson" by the Courts below) asserted that statements she made as a public employee during the course of her official duties were protected by the First Amendment. Petitioner also claimed her placement on paid leave pending an investigation of her behavior, and her subsequent termination, following detailed notice of the charges, and a two-day hearing before an impartial hearing officer, violated her procedural due process rights and her liberty interest under the Due Process Clause of the 14th Amendment. Petitioners surreply brief in the summary judgment briefings advanced, for the first time, a substantive due process claim.[1]

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1. Petitioner's claim changed throughout the course of this litigation. The case began as a First Amendment retaliation claim with procedural due process and liberty interest claims, including claims the College denied her access to witnesses, coerced witnesses, denied her pre-hearing discovery, stigmatized her, and deprived her of a liberty interest when it placed her on paid administrative leave. It then evolved into a case where she claims the College should have provided her affidavits "in advance" and relied upon "false evidence." Petitioner's free speech claim is no longer being prosecuted, she no longer contests George's qualified immunity, she presents no argument in support of her liberty interest claim, and she apparently drops her claim that the hearing officer was somehow conflicted from impartially deciding whether the College demonstrated cause to terminate.

On appeal to the Third Circuit, Petitioner abandoned her First Amendment claim. In exercising plenary review over the District Court's grant of summary judgment, the Third Circuit rejected Petition's procedural due process claim. The Third Circuit held that Petitioner received all the process she was due under the Due Process Clause, and more process than she was due under her employment contract. The Third Circuit noted with approval the District Court's determination that Petitioner's delay in raising the substantive due process claim until she filed her surreply brief in summary judgment was unreasonable. More importantly, the Third Circuit affirmed the holding that any inaccuracies in an investigative report did not rise to the level of a substantive due process violation because Petitioner had every opportunity to challenge any inaccuracies at the termination hearing, and the evidence presented at the hearing supported the hearing officer's finding that Johnson converted her employer's resources to her personal use. On appeal to this Court, Petitioner asserts for the first time a claim that the grant of summary judgment violated Petitioner's rights under the 7th Amendment of the federal constitution.

There is no split among the circuits pertinent to the resolution of this case. Moreover, the Third Circuit's ruling was correct, and the petition should be denied.

COUNTER STATEMENT OF THE GOVERNING FACTS

The "Statement" section of the petition omits critical facts, and mischaracterizes both facts in the record, and the holdings below.

Petitioner attempts to divert attention from the reason for her termination (financial improprieties) by beginning with a summary of accolades she received during her career. This summary is irrelevant to the findings of misconduct, and ignores the District Court's recognition of evidence that: "Johnson's success over the years was attributed to her being 'a tough cookie who didn't pull punches.' Detracting from her successful record were reports of a change in Johnson's behavior." As early as 2002, George expressed concern her behavior was "all too frequently out of control." *Johnson v. George* (*Johnson I*), C.A. No. 05-157-MPT, 2007 WL 1697276, at *1 (D. Del. June 12, 2007). Petitioner also ignores the District Court's recognition of evidence that in 2002 George asked that Petitioner to either take remedial steps to correct her behavior, or submit to a thorough investigation of the allegations. (*Id.*) The District Court also found that: "Ultimately, Johnson agreed to engage an outside consulting firm for counseling and behavior modification. Allegations of Johnson's abusive, contrary and disrespectful behavior to both colleagues and subordinates continued through 2004." (*Id.*)

Petitioner's statement that, during the course of a meeting on November 19, 2004, she asked questions that touched on matters of public concern (Pet. 7) relates to

the First Amendment claim she jettisoned on appeal to the Third Circuit. In all events, the District Court held that such statements are not speech on a matter of public concern protected by the First Amendment relying on this Court's decision in *Garcetti v. Cabellos*, 547 U.S. 410 (2006). *Johnson I*, 2007 WL 1697276, at *6.

Petitioner inaccurately states that in December 2004 George notified Petitioner that she demonstrated an unwillingness to support the College's IT network reorganization, was insubordinate, and failed to follow school policy. (Pet. 7) George's December 8, 2004 letter advises Petitioner of reports he received concerning the November 19, 2004 meeting, and points out that, if the reports George received are accurate, Petitioner asked questions raising doubt about her support for the IT Reorganization, and led some to believe Petitioner was unaware of the changes brought about by the Reorganization (A77-A78.)[2] In light of the earlier reports George received concerning Petitioner's inappropriate and unprofessional behavior, George requested a conference with Petitioner to discuss such behavior. (*Id.*)

Petitioner states she was given a choice of resigning, or her colleagues and staff would be interrogated. (Pet. 7) There was no threat of interrogation. George offered Petitioner the option of retiring, or the College would conduct an independent investigation of the behavior allegations. George told Petitioner he did not know whether the allegations were true, but he had to

2. Citations to "A__" are to documents found in the Appendix filed with the Third Circuit Court of Appeals on September 25, 2007.

get to the bottom of whether the allegations concerning the November 19, 2004 meeting, as well as the incidents in 2002 and thereafter, were true. (A1240.) Petitioner declined to retire. George decided to ". . . retain outside counsel, an independent, arm's length, well-respected law firm, who would come in and do the independent investigation formally, and determine whether or not the allegations were true." (A559.) Such an investigation was never completed because information concerning financial improprieties surfaced after Petitioner was placed on paid leave. (A126-A127; A488; A128-A129; A1250-A1251.)

Petitioner claims that, during the period of time when she was prohibited from speaking with present and former employees of the College (which might compromise the investigation), an investigation was conducted with the goal of terminating Petitioner for cause. (Pet. 9.) There is no evidence to support this claim.

There is no support in the record for the portions of the Petition characterizing the College's investigation as a "sham" focused on "handpicked witnesses" in order to reach a "foregone conclusion." While Petitioner states Simpson suggested only names of people who would support allegations of misconduct against Petitioner, (Pet. 9), Simpson testified he provided names of people related to the activities in question. (A1478.) By the same token, Petitioner's statements that witnesses were interrogated, she was denied access to witnesses, and witnesses were compelled to testify, (Pet. 8) are not supported by the record. Rather, witnesses testified that they did not feel any pressure testifying. (A1112.)

Moreover, witnesses testified that, at the time Petitioner was placed on paid leave, the Dean of Instructions said that they may be called upon to answer questions, and that they should be truthful without any fear of being concerned about any repercussions. (A1110.) Finally, no one is aware of anyone who testified for or against Petitioner at the termination hearing whose career has been affected. Petitioner also ignores the testimony of the Dean of Instruction that the interviews conducted started with the following introduction: "Whatever you say there's not going to be any retribution. We just want to find out, ask you some questions, get your input on occurrences at the Terry Campus and please answer them honestly and however you recall." (A1496.)

The contention no one contacted Petitioner for her version of the facts during the investigation (Pet. 9-10) disregards the fact that Petitioner was represented by counsel, and counsel for the College requested that Petitioner's attorney provide any relevant information. Petitioner's counsel did not respond to this request. (A553-A554.)

Petitioner incorrectly states the hearing officer relied upon the CPA Report prepared by SantoraBaffone CPA Group (the "CPA Report"). Petitioner repeatedly refers to the CPA Report as the "centerpiece" or "nucleus" of the evidence against her. She claims the termination decision "bottomed" on the CPA Report and was the "last word" on the propriety of her discharge. (Pet. 32.) While this assault on the CPA Report is inaccurate in several respects, the fatal flaw in Petitioner's argument is that Petitioner was not terminated based upon the CPA Report. Petitioner was terminated based on the evidence

presented at the two-day termination hearing. A review of the 550-page transcript of the termination hearing reveals the College presented 13 witnesses and 30 exhibits. Petitioner presented 7 witnesses and 47 exhibits. Indeed, her counsel objected to the CPA Report as hearsay. The CPA Report served the limited purpose of providing Petitioner detailed notice of the charges.[3] (A130-131.) The Hearing Officer's decision makes it clear his determination is based upon ". . . reviewing all of the evidence presented at the hearing including exhibits." (A154.)

In addition to the fact that the evidence presented at the termination hearing is the only material consideration, Petitioner's discussion of the CPA Report (Pet. 13-14) misstates several key facts. For example, Dwyer, the author of the CPA Report, was not limited to interviewing the list of individuals the College believes may have knowledge of Petitioner's financial improprieties. Rather, Dwyer testified that each person Dwyer interviewed suggested another person who should be interviewed, and that he did so. (A1156.) Moreover, stating that ". . . there is no attempt to find the truth of the allegations, except as within the limits of the directed agreed upon procedures," is misleading. A fair reading of the testimony upon which Petitioner relies in making this statement is that Dwyer's objective was to find the facts concerning the issues he was investigating, as opposed to looking at issues outside the scope of his investigation. (A1168.) Moreover, he never testified the report was "deliberately skewed to favor the College." (Pet. 26.)

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3. The College did not present evidence on all of the charges set forth in the CPA Report.

ARGUMENT

Petitioner appeals to this Court because the Petitioner contends the College terminated her based upon fabricated evidence, and disputed facts were construed at summary judgment in favor of the moving party. The petition should be denied not only because she makes these arguments with complete disregard to the standard of review, the undisputed facts, and prevailing law, but also because this case involves none of the factors which make a case worthy of granting certiorari.

I. PETITIONER'S FAILURE TO PRESENT THE SEVENTH AMENDMENT CLAIM TO THE COURTS BELOW MUST RESULT IN THE DENIAL OF CERTIORARI.

Petitioner alleges that summary judgment is being undermined, which affects her Seventh Amendment right to a jury trial. This claim was not presented to the courts below. Thus, neither the District Court, nor the Third Circuit addressed this contention. This Court will not review a claim which the Petitioner failed to assert in the courts below. *Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co.*, 549 U.S. 443, 444-445 (2007) (citing *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169 (2004)) ("The Court ordinarily does not consider arguments . . . that were neither raised nor addressed below, . . ."); *see also Clingman v. Beaver*, 544 U.S. 581, 598 (2005) (*citing Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169 (2004); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992)) ("We ordinarily do not consider claims neither raised nor decided below, . . .").

II. CERTIORARI SHOULD BE DENIED BECAUSE THE SUBSTANTIVE DUE PROCESS CLAIM WAS NOT ALLEGED IN THE COMPLAINT.

Petitioner argues the termination decision is based upon "false evidence" (Pet. 17-29) in violation of the right to substantive and procedural due process. Putting to the side the fact that Petitioner ignores the limited standard of review applicable to a substantive due process claim (Argument IV), as the District Court and the Third Circuit noted: "Neither Johnson's complaint nor her amended Complaint included a claim for a violation of substantive due process." *Johnson v. George* (*Johnson II*), 299 Fed. Appx. 139, 142 (3d Cir. 2008). Indeed, Petitioner did not specifically raise the substantive due process claim until she filed her surreply brief in the summary judgment briefing. (*Id.*) Her failure to plead substantive due process is fatal to her claim. *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating a complaint must give the defendant "fair notice of what the plaintiff's claim is") *abrogated on other grounds by*, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also* Fed. R. Civ. P. 8(a) ("A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim . . . and (3) a demand for the relief sought . . ."). The District Court points out that:

> Johnson argues, essentially for the first time in a lengthy surreply brief of thirty-four pages that the evidence at the pre-termination hearing was false and incomplete. In her fifty page answering brief (in excess of the page limitation authorized under the court's local rules), she alludes to a possible substantive

> due process claim. No where in her original or amended complaints is a substantive due process claim raised. Further, those complaints are absent of any allegations of fraud, which under the Federal Rules of Civil Procedure (" FRCP"), specifically Rule 9, are to be pled with specificity. Therefore, no notice of a substantive due process claim was provided. Johnson points to no discovery directed to such a claim.
>
> The primary evidence Johnson alleges as false is the [CPA] Report, a document she possessed for over two and a half months before the pre-termination hearing. Johnson cross-examined the investigator and author, David Dwyer, during that hearing.
>
> Johnson knew or should have known of a substantive due process claim before this action was filed. Johnson's back door amendment to the pleadings is inconsistent with FRCP and the Local Rules of Civil Practice and Procedure of this court.

Johnson I, 2007 WL 1697276, at n. 71; see *Johnson II*, 299 Fed Appx. at 142 ("Neither Johnson's complaint nor her amended complaint included a claim for a violation of substantive due process."). Petitioner's backdoor amendment to the pleadings precludes granting certiorari.

III. CERTIORARI SHOULD BE DENIED WHEN AN APPEAL CONCERNS ONLY THE RIGHTS OF THE PETITIONER, THERE IS NO CONFLICT AMONG THE CIRCUITS, INVOLVES NON-PRECEDENTIAL OPINIONS BELOW, AND MERELY QUARRELS WITH FACTUAL FINDINGS AND THE APPLICATION OF EXISTING LAW.

This case does not meet the rigorous standards applied by this Court in determining whether to grant certiorari. A decision by this Court will not resolve a conflict between circuits. Moreover, this is not a case with broad implications to other public employees. To the contrary, this case is fact specific with respect to: the notice Petitioner received prior to her hearing; her rights under her employment contract; whether substantial evidence supported the decision to terminate; and whether the decision to terminate is supported by substantial evidence, and is not irrational or arbitrary. The determination of these issues will have no impact upon a class or group of individuals.

In addition, the cases below were not reported cases. Therefore, the cases below will not have an effect on other litigants.

Finally, Rule 10 provides that: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The petition falls squarely within the limitation set forth in Rule 10.

IV. THERE IS NO VIOLATION OF SUBSTANTIVE DUE PROCESS WHERE THE ADMINISTRATIVE FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE, AND ARE NEITHER ARBITRARY NOR IRRATIONAL.

The Petitioner's attempt to use the substantive due process claim as the avenue for securing a trial de novo of the termination decision suffers from a fatal flaw. Petitioner ignores the limited standard of review. The District Court summarized the Petitioner's burden as follows:

> To support a violation of substantive due process, government action must be so "ill conceived or malicious that it shocks the conscience" or "arbitrary or irrational," exceeding negligence and indifference to "reach a level of gross negligence." "The exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." In a substantive due process matter, a properly supported motion for summary judgment will require the nonmovant to produce some (more than a "scintilla") evidence in support of his position.

Johnson I, 2007 WL 1697276, at *9 (citing *Miller v. Philadelphia*, 174 F.3d 368, 374, 376 (3d Cir. 1999); *Duffy v. Bucks*, 7 F. Supp.2d 569, 576 (E.D. PA 1999); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Applying this standard of review, the District Court concluded the decision to terminate ". . . cannot

be described as malicious, arbitrary or irrational," and the evidence presented at the hearing supports the hearing officer's findings. *Id.*

The District Court points out that Petitioner's claim that the investigative report includes "false evidence" disregards Petitioner's opportunity to present and confront witnesses at a pre-termination hearing. Moreover, the hearing took place after Petitioner was provided notice of the charges over two months prior to the hearing, over one thousand pages of documents, a list of the College's witnesses 11 days in advance of the hearing, and the exhibits the College planned to rely on at the hearing. The District Court concluded that "Nothing Johnson has presented rises to the level of a substantive due process claim." *Id.*

Petitioner suggests that the evidence used to terminate was fabricated. She had a hearing at which an impartial hearing officer, a retired judge who served on the Delaware Superior Court for 32 years, heard evidence over the course of two days. She presented testimony and evidence to test the evidence the College introduced against her. The hearing officer concluded that the College met its burden of establishing cause to terminate. The courts below confirmed that substantial evidence supported the hearing officer's decision.

What Petitioner attempted to do in the courts below, and attempts to do now, is use a substantive due process claim to secure *de novo* review of an administrative decision. Such attempts are consistently rejected. *Klinge v. Lutheran Charities Ass'n of St. Louis*, , 523 F.2d, 56, 60 (8th Cir. 1975). ("While plaintiff was entitled

to judicial review of the administrative action that was finally taken against him, he was not entitled to a trial *de novo* as to his competency to remain on the staff at Lutheran. The judicial inquiry available to him was limited to a consideration of whether his ultimate removal from the staff involved deprivations of procedural or substantive rights guaranteed by the fourteenth amendment."); *Blunt v. Marion County Sch. Bd.*, 515 F.2d 951, 956 (5th Cir. 1975) ("Our judicial review of Mrs. Blunt's claim that in her dismissal by the Marion County School Board she was denied substantive due process is circumscribed. For sound policy reasons, courts are loathe to intrude upon the internal affairs of local school authorities in such matters as teacher competency."); *Simard v. Bd. of Educ. of Town of Groton*, 473 F.2d 988, 995 (2d Cir. 1973) ("The district judge was not required to make a *de novo* determination of the truth of the charges against Simard"); *Logan v. Warren County Bd. of Educ.*, 549 F. Supp. 145, 150 (S.D. Ga. 1982.) ("In reviewing the decision not to renew plaintiff's contract, the Court is limited to a two step level of inquiry: 1) whether the procedures followed by the school authorities comported with due process requirements, and, if so, 2) whether the action taken is supported by substantial evidence"); *Viverette v. Lurleen B. Wallace State Jr. Coll.*, 587 F.2d 191, 193 (5th Cir. 1979) ("Because federal courts are limited in the scope of their review to the procedures employed by and the evidence before an educational review board, it was not improper for the district court to grant summary judgment on the basis of the transcript of the hearing by the [administrative tribunal] and the exhibits attached thereto; in fact, *de novo* hearings in district courts on such matters are not favored.").

Providing dismissed employees a *de novo* hearing in federal court will undermine the purpose of administrative dismissal hearings and overburden the federal courts with dismissal hearings for terminated employees for the following reasons.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

Bishop v. Wood, 426 U.S. 341, 359-60, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976).

In short, Petitioner's substantive due process argument does not secure a *de novo* hearing if, as is the case here, substantial evidence supports the termination decision, and the government action is not so ill conceived or malicious that it shocks the conscience, or arbitrary or irrational. In addition, Petitioner overstates the significance of the CPA Report, which she claims is "riddled with errors and omissions." She would like the Court to believe the "flawed" CPA Report

was the only evidence offered to establish her misconduct. To the contrary, as the District Court points out, the hearing officer's findings were based on the evidence presented by a total of 20 witnesses and 77 exhibits at the two day hearing. *Johnson I*, 2007 WL 1697276, at *8. The limited purpose of offering the CPA Report was to demonstrate that Petitioner had notice of the charges against her. Indeed, the CPA Report was incorporated by reference into the notice of intent to terminate so that Petitioner knew, well in advance, the allegations against her. "Two and a half months prior to the hearing, Petitioner received the CPA Report which outlined the allegations of financial abuse which were the basis for her dismissal." *Id.* Similarly, the Third Circuit observed that: "Furthermore, the District Court concluded that, considering all the evidence proferred at the pre-termination hearing other than the Santoro Report, the record supported the hearing examiner's finding that Johnson had converted the College's resources for her personal use. We find no error in the District's ruling on this issue." *Johnson II*. 299 Fed. Appx. at 142.

Petitioner claims the District Court wrongly found that the CPA Report was an audit prepared in accordance with AICPA standards. The issue of whether the CPA Report was an audit and complied with AICPA standards was not presented to the District Court. In an effort to make it appear that the District Court determined the CPA Report was an audit, she cites to the Appendix at page 13. At the end of the sentence where the District Court makes a statement concerning the report being an audit, there is a footnote in which the District Court notes that the report was reviewed

by the State of Delaware Office of Auditor of Accounts, and that the State Auditor concurred with the findings of the CPA Report, and referred the case to the Office of Attorney General for the State of Delaware for review and any further action.

Petitioner also argues the District Court wrongfully concluded the CPA Report determined Petitioner violated College policy. Whether the CPA Report concluded policy was breached was not the issue presented to the hearing officer, or the District Court.

Stripped to its essential element, Petitioner contends the CPA Report is flawed because, although she misappropriated College resources, the CPA Report reached incorrect conclusions as to the magnitude of the misappropriation. The hearing officer found cause for termination based upon misappropriation of thousands of dollars of personal time and material of the College. *Johnson I*, 2007 1697276, at *8. Whether Petitioner's misappropriation was in the amount of $1,000, $2,000 or $15,000 is immaterial. In all events, there was cause to terminate.

Petitioner asserts the District Court made findings of fact and weighed evidence (Pet. 32), and contends the Third Circuit "impliedly" weighed evidence as well. Neither court found facts, or weighed evidence. To the contrary, the courts below reviewed the decision to grant summary judgment in a light most favorable to Petitioner, *Johnson II*, 299 Fed. Appx. 139 at 142; *Johnson I*, 2007 WL 1697276, at *3, and based on the limited standard of review applicable to a substantive due process claim. The Court of Appeals stated:

"Johnson also claims that the District Court failed to properly apply the summary judgment standard. We find nothing to support this claim." 299 Fed. Appx. 139 at n.3.[4]

In addition, Petitioner contends the District Court construed disputed facts in favor of the College by finding that Petitioner's abusive conduct continued through 2004 and that Petitioner was antagonistic to the College's new IT policy. The evidence presented to the hearing officer focused on Petitioner's financial misconduct. Evidence of her abusive treatment of employees was offered for the limited purpose of explaining why employees did not initially report the misconduct. Whether Petitioner was antagonistic to the College's new IT policy has nothing to do with whether the hearing officer received substantial evidence to conclude she engaged in financial improprieties.

Petitioner also alleges the District Court found that the "failure" by the College to provide Petitioner with affidavits of witnesses was irrelevant. This was not a finding of fact that resulted from weighing evidence. Rather, it was plain that the rules of procedure adopted for Petitioner's termination hearing far exceeded the limited right to receive affidavits which was provided for in her employment agreement. No weighing of evidence was necessary to reach this conclusion. The Court of Appeals reached the same conclusion. 299 Fed. Appx 139 at *142.

4. The contention that the Court of Appeals "impliedly" weighed evidence is at odds with the standard of review, which exercised plenary review of the district court's grant of summary judgment. *Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 152 (3d Cir. 2007).

Finally, Petitioner claims the College "impliedly" told the College community that Petitioner committed an act of wrongdoing when she was put on paid administrative leave, and the College community was informed of this fact. This is essentially the same "stigma" argument she advanced in her complaint, but did not address in response to the College's motion for summary judgment, and did not address on appeal to the Third Circuit. Moreover, the argument that placing her on paid administrative leave "stigmatized" her collides with well-established law in the Third Circuit. *See, e.g., Edwards v. California Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir.1998), *cert. denied*, 525 U.S. 1143 (1999). In *Edwards*, the Third Circuit heard an appeal from a teacher who was suspended with pay and later brought suit alleging, *inter alia*, he was deprived of a protected liberty interest because a suspension harmed his reputation. Petitioner makes the same argument. The District Court in *Edwards* holds "because Edwards was suspended with pay, he cannot prove that he was deprived of a property interest deserving due process guarantees." *Id.* On appeal, the Third Circuit agreed, stating "'[s]tigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment.'" *Id.* (citing *Robb v. City of Philadelphia*, 733 F.2d 286, 294 (3d Cir.1984) and *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987)) (explaining that the Supreme Court requires "both damage to reputation and the extinguishment of government employment as a predicate for due process protection."). Petitioner alleges no liberty interest other than harm to her "reputation," and she was merely suspended with pay, not terminated, prior to her pre-termination hearing.

See Id. at 492 (stigma alone does not violate an employee's liberty interest).[5] Thus, Petitioner's liberty interest was not violated.

V. PETITIONER RECEIVED MORE PROCESS THAN SHE WAS DUE UNDER THE DUE PROCESS CLAUSE, OR HER EMPLOYMENT AGREEMENT.

Petitioner contends the courts below erred in granting and affirming summary judgment on her procedural due process claims. In reaching this conclusion, Petitioner misconstrues both the undisputed facts and the well settled law.

A. When A Petitioner Is Placed On Paid Administrative Leave With Full Pay And Benefits, She Is Not Subject To Discipline Such As Would Provide Her With Grievance Rights Under Her Employment Contract

Petitioner contends her placement on paid administrative leave pending the completion of an investigation constituted discipline, and the College's failure to entertain her grievance deprived her of due process. Petitioner refers to the College's employee handbook (the "Handbook") in arguing that she should have been afforded an opportunity to file a grievance when she was placed on paid administrative leave

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5. This rule only makes sense. Otherwise, every time that an employee is placed on leave there would be an allegation that the act of putting the employee on leave stigmatized the employee.

pending an investigation. Petitioner was not entitled to grieve being placed on paid administrative leave with benefits because the paid leave was not an act of discipline. Petitioner was not reprimanded.

Courts consistently recognize the placement of a public employee on paid leave does not deprive the employee of a property right. *See Edwards*, 156 F.3d at 492 (placement of tenured professor on paid leave did not implicate due process concerns); and *Jerrytone v. Musto*, 167 Fed. Appx. 295, 301 (3d Cir. 2006) (placement of teacher on paid suspension without prior hearing was not violation of procedural due process). Placing a public employee on administrative leave with pay has been blessed by this Court as an effective means of dealing with interim pre-termination issues without infringing on the employee's rights. Indeed, in *Cleveland Bd. of Educ. v. Loudermill*, the Court noted a public employer can "avoid the [due process] problem by suspending [the public employee] with pay." 470 U.S. 532, 544-45 (1985).

B. A Termination Process Is Adequate When It Provides Notice And An Opportunity To Be Heard By An Impartial Decision Maker

Generally, Petitioner was entitled to "oral or written notice of the charges . . . , an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. The District Court found the process provided to Petitioner satisfied the requirements of the 14th Amendment and her employment contract. Indeed, the District Court determined Petitioner received a list of the College's witnesses 11 days in advance, over 1,000 pages of

documents in advance requested by her counsel, notice of the reason for her termination via a copy of the report detailing her infractions two and one half months before the hearing, all materials and demonstratives in advance relied upon by the College, and the ability to call and cross examine witnesses and present evidence. The District Court also noted Petitioner had counsel, testified, presented seven witnesses, and offered 47 exhibits. *Johnson I*, 2007 WL 1697276, at *8. Importantly, she received a decision made by an impartial decision maker, retired Delaware Superior Court Judge Bifferato, who heard testimony and reviewed exhibits. *Id.* The District Court determined Judge Bifferato was an impartial hearing officer. *Id* at n.74. The College agreed to be bound by Judge Bifferato's decision. *Id.* at *7. The record overwhelmingly supports the District Court's conclusion Petitioner was afforded adequate procedural due process as follows:

> [Petitioner] received ample notice of the charges and had a reasonable opportunity to prepare a response. [Petitioner] was aware that her activities were under investigation more than six months prior to the hearing. Two and a half months prior to the hearing, [Petitioner] received the [CPA] Report which outlined the allegations of financial abuse which were the basis for her dismissal. Two weeks before the hearing, the College provided notice of the witnesses it was going to call, and days before, the College offered all of the materials and demonstratives used at the hearing. Therefore, notice was

> sufficient as it provided the nature of the charges and the evidence against her, and was timely under the circumstances of the case.

Id. at *8.

In short, Petitioner received process which exceeded the minimal due process required by the Due Process Clause of the 14th Amendment, and far more process than was due under her contract and the termination procedures in place prior to the adoption of revised termination procedures on April 26, 2005.

1. Petitioner Received Notice Of The Charges

Petitioner's claim she did not have notice of the charges, and that the allegations were vague (Pet. 25), is at war with record. Notice is sufficient if it apprises the vulnerable party of the nature of the charges and general evidence against him, and if it is timely under the particular circumstances of the case. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987); *Morton v. Beyer*, 822 F.2d 364, 371 (3d Cir. 1987) (stating that an employee must be apprised of the nature of the allegations before or at the time the hearing begins). Here, Petitioner was informed of the nature of the allegations well in advance of the June 29, 2005 termination hearing, including the following:

1. On March 7, 2005, Petitioner's counsel was informed the College was looking into Petitioner's involvement in certain financial irregularities. (A126-127.)

2. On March 16, 2005, Petitioner's counsel was informed the financial irregularities concerned the use of College resources in connection with Petitioner's large family reunion and questionable purchases. (A128-129.)

3. On April 27, 2005, the College provided Petitioner's counsel with a notice of intent to terminate detailing the reasons for the notice by incorporating the CPA Report by reference, as well as the Rules of Procedure adopted by the Trustees on April 26, 2005. (A109.) The April 27, 2005 letter also indicated that Petitioner's administration by fear and intimidation caused Petitioner's misconduct to remain undetected. (*Id.*)

4. In a May 5, 2005 letter, Petitioner's counsel concedes she is on notice of the allegations concerning her financial mismanagement, and seeks information regarding her administration by fear and intimidation. (A132-133.)

5. On May 6, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation included privately and publicly humiliating numerous College employers in a loud and abusive manner, including frequently accusing employees of being incompetent and threatening to fire employees. (A134-135.)

6. On June 10, 2005, the College provided answers to Petitioner's first set of discovery requests which she filed in this parallel lawsuit.

7. On June 16, 2005, the College provided responses to Petitioner's second set of requests for production filed in the parallel lawsuit.

8. On June 23, 2005, Petitioner's counsel wrote to the College's counsel to confirm the issues to be presented at the termination hearing. (A149-150.)

9. On June 27, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation would not be a basis for her termination. (A151-152.)

10. Prior to the termination hearing, the College identified its witnesses (A496-497), provided over 1,000 pages of documents requested by Petitioner's counsel, and provided copies of the College's termination hearing exhibits.

2. Petitioner Received An Explanation Of The College's Evidence In Advance

Petitioner contends she did not receive enough information in advance of the termination hearing. Due process requires "only that such descriptive explanation be afforded as to permit [the plaintiff] to identify the conduct giving rise to the dismissal and thereby to enable [her] to make a response." *Linton v. Frederick County Bd. of County Comm'rs*, 964 F.2d 1436, 1440 (4th Cir. 1992).[6] Petitioner certainly knew the reasons for her termination, which were set forth in the CPA Report

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6. Petitioner's assertions regarding a contractual right to specific evidence are not only contrary to the well established standards, but they are also inconsistent with the record. Indeed, substantial notice was provided which satisfies both her contract and the due process clause because the CPA Report, which outlined the charges against her, was incorporated by reference into the notice of intent to terminate.

incorporated by reference into the notice of intent to terminate. In addition to complying with the request of Petitioner's counsel for over 1,000 pages of documents, Petitioner's counsel received the College's termination hearing exhibits 2 days prior to the hearing, and the College identified its witnesses 12 days prior to the termination hearing. (A281-2; A284; A504.) The College provided affidavits the day before the termination hearing commenced. (A505.) *See Belas v. Juniata County Sch. Dist.*, 202 Fed. Appx. 585, 587 (3d Cir. 2006) (finding as "spurious" a dismissed school principal's claim that she did not receive documents from the school board until it was time to begin her case and that she was not provided with a bill of particulars setting forth in greater detail the 20-page document containing charges against her).

3. Petitioner Received An Opportunity To Present Her Side Of The Story To An Impartial Decision Maker

A well-respected retired Judge was appointed as the impartial decision maker, and the Trustees of the College agreed to be bound by his decision. Petitioner was represented by experienced counsel who cross-examined the College's witnesses, and presented witnesses and exhibits at a two-day hearing transcribed by a court reporter.

Petitioner contends she was not able to prepare a defense because she was instructed not to visit any College facilities, not to participate in any college functions, and not to discuss the subject matter of the investigation with any present or former employees.

Petitioner fails to mention that, once the notice of intent to terminate was provided on April 27, 2005, Petitioner was free to contact such persons during the two month period that preceded the hearing. Indeed, her counsel contacted "various" employees and former employees before the termination hearing, and presented many of them as witnesses.

Petitioner claims that in the days leading up to the June 29, 2005 hearing, she took issue with the fact she did not have subpoena power to compel witnesses favorable to her, that witnesses may suffer retaliation, that there was no information provided regarding instances of her abusive or inappropriate behavior, and that she had not received the College's evidence in advance. She offers no authority for her claim of a right to subpoena witnesses for an administrative termination hearing. There is no evidence of retaliation. Her abusive and inappropriate behavior was offered for the limited purposes of explaining why employees did not "blow the whistle" on her misconduct. In advance of the hearing, Petitioner was informed that her administration by fear and intimidation would not be a basis for her termination. (A151-152.) She was advised of the general nature of the evidence which would be offered on this point.

Petitioner inaccurately states that the College refused to guarantee that it would not retaliate against Petitioner's witnesses. On June 17, 2005, the College offered to send each employee Petitioner's counsel was attempting to communicate with a letter providing assurances there will be no retaliation for cooperating with Petitioner's counsel, or testifying at the

termination hearing. (A498.) The College repeated this offer on June 22, 2005 rejecting Petitioner's request for a public statement to all employees of the College that there will be no retaliation. (A502-503.) Petitioner's counsel finally accepted the College's offer shortly prior to the hearing.

Petitioner relies upon *Arnett v. Kennedy*, 416 U.S. 134 (1974) for the proposition that she had a right to marshal and adduce her own evidence concerning whether she committed the charged misconduct, whether the investigation was fair, unbiased and complete, and whether she had violated College policy. *Arnett* does not stand for this proposition. To the contrary, Petitioner was entitled to "oral or written notice of the charges . . . , an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 546. Moreover, as a factual matter, her claim that she could not marshal her own evidence because she "could not talk to any of the College personnel and could not interview them for her own defense" is false. As set forth previously, once the notice of intent to terminate was provided on April 27, 2005, Petitioner was thereafter free to contact such persons, and she did so. Similarly, her statement that she was precluded from adducing evidence to rebut the "fraudulent proof" against her (Pet. 27) is false. The District Court determined Petitioner received a list of the College's witnesses 11 days in advance, *Johnson I*, 2007 WL 1697276, at *7, over 1,000 pages of documents in advance requested by her counsel, *Id.*, notice of the reason for her termination via a copy of the report detailing her infractions two and one half months before the hearing (*Id.*), all materials and demonstratives in

advance relied upon by the College, *Id.*, and the ability to call and cross examine witnesses and present evidence. *Id.* at *8. The District Court also noted Petitioner had counsel, testified, presented seven witnesses, and offered 47 exhibits. *Id. See also* 299 Fed. Appx. 139 at 142 ("Johnson was represented by counsel, and was able to test the truthfulness of the accusations against her. Johnson testified on her own behalf and proffered 6 witnesses and 47 exhibits.")

C. Providing Petitioner The Right To Cross-Examine And Present Witnesses Replaced And Exceeded Her Limited Right to Receive Affidavits

Petitioner claims she had a property interest in the termination process which existed before the College dramatically expanded her due process rights, including the right to receive affidavits of witnesses. On April 26, 2005, upon recommendation of counsel, the College's Trustees adopted Rules of Procedure for the Conduct of Termination Proceedings ("Rules of Procedure"). The Rules of Procedure provide the following procedural rights:

1. Notice of the reasons for termination.

2. A hearing before an independent, impartial Hearing Officer.

3. The right to confront and cross-examine witnesses testifying under oath.

4. The creation of a stenographic record.

5. The burden of the College to establish one or more reasons for termination by a preponderance of the evidence.

6. The preparation of a written decision by the Hearing Officer.

7. The decision of the Hearing Officer is final.

Johnson II, 299 Fed. Appx. at 141 n. 4. But for the adoption of the Rules of Procedure, the hearing would have been controlled by Petitioner's Employee Master Contract, and Section 12.02 of the College's Personal Policy Manual. Thus, Petitioner would have been limited to the following procedural rights:

1. Notice of the reasons for termination, including any act or course of conduct which constitutes a reasonable hazard to the health, safety and well-being of employer.

2. Affidavits from persons with knowledge supporting termination.

3. A hearing presided over by the College's Chief Legal Counsel in which neither the employer, nor the employee, is obligated to produce witnesses or be subject to cross-examination.

4. The College's Chief Legal Counsel determines whether witnesses may attend the hearing.

5. The Chief Legal Counsel submits a recommendation to the applicable Vice-President and Campus Director for final determination. (A175-A178; A290; A163-A164.)

In the context of hearing procedures which did not require that the College produce witnesses at the termination hearing, the Employee Master Contract required that the College provide affidavits of persons having knowledge of the cause for termination. The College adopted rules requiring the production of witnesses, as well as the right to cross-examine. Petitioner nevertheless insisted the College provide affidavits. The College provided affidavits the day before the termination hearing commenced, not the day of the hearing, as alleged. (A505-A506.)

Petitioner alleges she was deprived of affidavits in advance of the termination hearing because the affidavits were delivered the day before the termination hearing. To begin with, public employees have no right to pre-termination discovery. *Ashton v. Whitman*, 94 Fed. Appx. 896, 900-901 (3d Cir. 2004)

> Recognizing the limited purpose of pre-termination proceedings, courts have held that due process does not require an employer to provide every piece of evidence relevant to an employee's termination . . . . We conclude that requiring mandatory disclosure of material, exculpatory evidence prior to termination "would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

(quoting *Loudermill*, 470 U.S. at 546); *see also Wells v. Dallas Ind. Sch. Dist.*, 793 F.2d 679, 683 (5th Cir. 1986)

> When an administrative termination hearing is required, federal constitutional due process

> demands either an opportunity for the person charged to confront the witnesses against him and to hear their testimony or a reasonable substitute for that opportunity. One who is present, who sees and hears the witnesses against him, has notice of who they are and what they maintain before he must meet them with his case; his confrontation rights are satisfied . . . . The authorities upon which [plaintiff] relies to demand names and summaries of testimony in advance *plus* confrontation are cases in which there was no confrontation and we required the other as a substitute.

(emphasis in original). *NLRB v. Valley Mold Co., Inc.*, 530 F.2d 693, 695 (6th Cir. 1976) ("[P]arties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right."); *Galvin v. New York Racing Ass'n*, 70 F. Supp. 2d 163, 176 (E.D.N.Y. 1998) (where plaintiff complained of a lack of due process in a hearing resulting in license suspension, the Court states: "The exact evidence to be presented need not be included in the notice, so long as the allegations are sufficient to alert the accused to the misconduct with which he is being charged.") (citing *Patterson v. Ramsey*, 413 F. Supp. 523, 536 (D. Md. 1976), *aff'd*, 552 F.2d 117 (4th Cir. 1977)).

Petitioner had no reasonable expectation the affidavits were to be provided in advance of the hearing for use in preparing for the hearing. The Employee Master Contract and the Personnel Handbook provide that the affidavits were to be used as evidence in support

of termination rather than a means of providing notice of the reasons for termination. Indeed, the Employee Master Contract and the Personnel Handbook are silent as to whether the affidavits were to be provided at the termination hearing or in advance thereof. Petitioner's expectation that the purpose of the affidavits was to provide notice ignores the fact the affidavits were to be presented at a termination hearing in lieu of presenting witnesses. Thus, the only reasonable expectation was that the affidavits would be presented at a termination hearing. There is no support for the assertion the affidavits were given "too late."

D. There Is No Procedural Due Process Violation Where The Employer Provides The Employee Notice Sufficient To Alert The Employee Evidence Will Be Presented At The Termination Hearing Concerning Administration By Fear And Intimidation, And Such Conduct Is Not A Basis For Termination

Petitioner's contention she did not receive information in advance concerning her administration by fear and intimidation is at odds with the record, and disregards the fact that Petitioner was not terminated because she administered the campus through fear and intimidation.

1. Petitioner Was Not Terminated For Her Administration By Fear And Intimidation

Evidence of Petitioner's administration by fear and intimidation was merely offered to explain why employees with knowledge of her misconduct did not

disclose it until she was placed on paid leave. On June 27, 2005, the College's counsel wrote to Petitioner's counsel and informed him that Petitioner's administration by fear and intimidation (just like the information concerning Petitioner's conduct at the November 19, 2004 meeting) would not be a basis for her termination. Additionally, administration by fear and intimidation is not one of the reasons for termination (*i.e.*, use of College employees to perform personal work at great expense to the College, use of College materials for personal matters, and use of the State credit card for personal purchases) identified by Judge Bifferato in his hearing officer's report. Indeed, the Court of Appeals specifically states: "An impartial hearing examiner, retired Judge Vincent Bifferato, concluded that Johnson had abused her position by using College personnel and materials for personal matters and that she had abused the use of her College-issued credit card." 299 Fed. Appx. at 141. There is no mention of her being terminated for her fear and intimidation. Therefore, Petitioner's claim she did not receive adequate notice of her administration by fear and intimidation, even if true, is irrelevant.

2. Petitioner Knew In Advance What Was The Nature Of Her Conduct That Amounted To Fear And Intimidation

Petitioner's claim she was not aware of the nature of the allegations concerning her administration by fear and intimidation collides with the record. On June 27, 2005, the College's counsel informed Petitioner's counsel that:

> In response to your request for specifics concerning allegations of abusive conduct, I

> indicated that the College's witnesses will generally state that Dr. Johnson was frequently loud and abusive in reprimanding employees, and that Dr. Johnson threatened to terminate employees on several occasions. I also indicated that because such conduct on the part of Dr. Johnson occurred over a number of years, was frequent, and employees that witnessed such conduct did not maintain diaries or logs, we cannot, for the most part, provide specifics concerning such a course of conduct. Later today, or tomorrow morning, you will be receiving the affidavits you requested which will provide somewhat more detail.

(A151-A152.)

Even assuming Petitioner was terminated for managing through the use of fear and intimidation, notice of the exact evidence to be presented is not required ". . . so long as the allegations are sufficient to alert the accused to the misconduct with which he is being charged." *Galvin*, 70 F. Supp. 2d at 176 (citing *Patterson*, 413 F. Supp. at 536.). The notice to Petitioner met this test.

CONCLUSION

For the reasons set forth in this brief, the Respondent respectfully request that the Court deny certiorari.

Respectfully submitted,

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